

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**M.P., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Birmingham, AL, Employer**

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**Docket No. 08-93  
Issued: May 6, 2008**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

ALEC J. KOROMILAS, Chief Judge  
DAVID S. GERSON, Judge  
MICHAEL E. GROOM, Alternate Judge

**JURISDICTION**

On October 10, 2007 appellant timely filed an appeal from a July 5, 2007 nonmerit decision of the Office of Workers' Compensation Programs denying her request for reconsideration as it was untimely and did not establish clear evidence of error. Because more than one year has elapsed from the most recent merit decision dated November 14, 2003 to the filing of this appeal, the Board lacks jurisdiction to review the merits of the claim pursuant to 20 C.F.R. §§ 501.2(c) and 501.3.

**ISSUE**

The issue is whether the Office properly refused to reopen appellant's case for further review of the merits on the grounds that her request for reconsideration was not timely filed and failed to demonstrate clear evidence of error.

**FACTUAL HISTORY**

This is appellant's third appeal before the Board. The Office had accepted that on December 17, 1999 appellant sustained a fracture of the second metatarsal when a container fell

on her left foot. In a November 14, 2003 decision, the Board found that the Office properly terminated appellant's compensation benefits effective August 10, 2002 on the grounds that she had no further disability causally related to her December 17, 1999 employment injury.<sup>1</sup> In a March 24, 2005 decision, the Board found that the Office properly refused to reopen appellant's case for further review on its merits on June 15, 2004. The facts and circumstances of the cases are set out in the prior decisions and are hereby incorporated by reference.

On April 20, 2005 appellant requested reconsideration and submitted progress notes from Dr. James L. Thomas, a podiatrist.

In an April 28, 2005 nonmerit decision, the Office denied appellant's reconsideration request, finding that she did not raise substantive legal questions or submit new and relevant evidence.

On April 3, 2006 appellant requested reconsideration. No additional information was submitted.

In an April 17, 2006 nonmerit decision, the Office denied reopening the case as appellant had neither submitted relevant evidence nor presented new legal arguments.

On March 29, 2007 appellant requested reconsideration and submitted additional documents. The Office received progress notes dated from November 9, 1999 through March 9, 2007 from Dr. Thomas. In a March 15, 2005 note, Dr. Thomas stated that appellant had symptoms in her right heel. An April 21, 2005 note recorded that appellant had been in a car accident and that both feet had been painful since that time. The July 19, 2005 note reviewed a recent magnetic resonance imaging (MRI) scan, which revealed a small stress fracture of the second metatarsal of the right foot. A January 9, 2007 MRI scan of the left foot found no fracture. The Office also received a December 18, 2006 progress note from Dr. Joel Mixon, a Board-certified radiologist, who reviewed a fracture in the right foot.

In a March 28, 2007 letter, Dr. Thomas noted that appellant developed deep vein thrombosis when she was treated for the initial stress fracture. In April 2003, she developed a new stress fracture of the fourth metatarsal on the left. Dr. Thomas stated that appellant continued to have pain in the left foot and that a recent MRI scan demonstrated degenerative arthrosis.

In a July 5, 2007 nonmerit decision, the Office denied appellant's reconsideration request finding that it was untimely and the evidence did not present clear evidence of error.

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<sup>1</sup> Docket No. 03-1903 (issued November 14, 2003). Appellant filed a petition for reconsideration with the Board on November 25, 2003. By order dated April 16, 2004, the Board denied the petition on the grounds that no error of fact or law was cited warranting further consideration. Docket No. 03-1903 (issued April 16, 2004).

## **LEGAL PRECEDENT**

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under section 8128(a) of the Federal Employees' Compensation Act.<sup>2</sup> The Office will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>3</sup> When an application for review is untimely, the Office undertakes a limited review to determine whether the application presents clear evidence that the Office's final merit decision was in error.<sup>4</sup> Office procedures states that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.607, if the claimant's application for review shows clear evidence of error on the part of the Office.<sup>5</sup> In this regard, the Office will limit its focus to a review of how the newly submitted evidence bears on the prior evidence of record.<sup>6</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office. In this case, the evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error in terminating appellant's compensation benefits. Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>7</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion. This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office. To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinions or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office's decision.<sup>8</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>9</sup>

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<sup>2</sup> 5 U.S.C. §§ 8101-8193.

<sup>3</sup> 20 C.F.R. § 10.607; *see also* *Alan G. Williams*, 52 ECAB 180 (2000).

<sup>4</sup> *Veletta C. Coleman*, 48 ECAB 367 (1997).

<sup>5</sup> *See Gladys Mercado*, 52 ECAB 255 (2001). Section 10.607(b) provides: The Office will consider an untimely application for reconsideration only if the application demonstrates clear evidence of error on the part of it in its most recent decision. The application must establish, on its face, that such decision was erroneous. 20 C.F.R. § 10.607(b).

<sup>6</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>7</sup> *Leon J. Modrowski*, 55 ECAB 196 (2000); *Dorletha Coleman*, 55 ECAB 143 (2003).

<sup>8</sup> *Id.*

<sup>9</sup> *Pete F. Dorso*, 52 ECAB 424 (2001); *John Crawford*, 52 ECAB 395 (2001).

### **ANALYSIS**

The Office correctly determined that appellant's reconsideration request was untimely as it was not filed within one year of the last merit decision. The most recent merit decision was issued by the Board on November 14, 2003, which found that the Office properly terminated appellant's compensation entitlement on the grounds that she had no further disability causally related to her December 17, 1999 employment injury. As appellant's March 29, 2007 reconsideration request was more than one year after this decision, it was untimely.

When an application for review is untimely, the Office will undertake a limited review to determine whether the application presents clear evidence that the final merit decision was in error.<sup>10</sup> The issue in this case is whether appellant has demonstrated clear evidence of error on the part of the Office in terminating her compensation entitlement.

Appellant submitted evidence in support of her reconsideration request. The progress notes from Dr. Thomas and Dr. Mixon related to injuries or conditions other than the accepted fracture of the left second metatarsal and are not relevant to the issue of whether appellant had residuals or disability beyond the termination date of July 30, 2002. In a March 28, 2007 narrative report, Dr. Thomas opined that appellant has had numerous problems with both feet, was at high risk for stress fractures of the feet and had developed deep vein thrombosis when she was treated for the initial stress fracture. While Dr. Thomas opined that appellant continued to have pain in the left foot, he did not address how her accepted condition related to the original injury. Under the clear evidence of error standard it is not enough that evidence could be construed to provide a contrary conclusion but must be of sufficient probative value to shift the weight of the evidence in favor of appellant and raise a substantial question as to the correctness of the merits of the Office's decision. The weight of the evidence has not been shifted in favor of appellant such that it raises a substantial question as to the correctness of the Office's decision. On its face the evidence submitted does not establish that appellant's accepted condition had not ceased. Therefore, the Office did not abuse its discretion when it denied merit review in light of the medical evidence submitted.

### **CONCLUSION**

The Board finds that the Office did not abuse its discretion in finding that appellant's request for reconsideration was untimely filed and did not establish clear evidence of error.

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<sup>10</sup> See *supra* note 5.

**ORDER**

**IT IS HEREBY ORDERED THAT** the July 5, 2007 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: May 6, 2008  
Washington, DC

Alec J. Koromilas, Chief Judge  
Employees' Compensation Appeals Board

David S. Gerson, Judge  
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge  
Employees' Compensation Appeals Board